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No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BASIN ELECTRIC POWER COOPERATIVE'S REPLY MEMORANDUM TO WYOMING'S MEMORANDUM IN OPPOSITION TO BASIN'S MOTION FOR LEAVE TO INTERVENE

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INTRODUCTION

In its April 14 Memorandum in Opposition to Basin's Motion for Leave to Intervene, Wyoming relies solely on *parens patriae* grounds, citing in support *New Jersey v. New York*, 345 U.S. 369 (1953) and *Nebraska v. Wyoming*, 295 U.S. 40 (1935).

ARGUMENT

A. Wyoming Lacks an Essential Element of *Parens Patriae*

In the circumstances of this case invocation of *parens patriae* avails Wyoming naught. In *New Jersey*

v. New York, supra, this Court recognized that *parens patriae* considerations would not prevail if the applicant for intervention met the burden of showing "a compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U.S. at 372-73.

The correspondence reproduced at Appendix A-8 through A-10 of Basin's Memorandum In Support of Its Motion to Intervene shows on its face that Wyoming denies Basin's right to utilize its Wyoming water rights in discharge of its obligation under the Grayrocks Settlement Agreement. Surely there can be nothing more compelling than Wyoming's own statements.

It seems obvious that, given Nebraska's complaint and Wyoming's expressed objections to Grayrocks' operation in accordance with the Settlement Agreement, this litigation directly impacts Basin's interests. A resolution resulting in a "clarification" of the North Platte Decree which compels a different mode of operation of Grayrocks than that provided for in the Grayrocks Settlement Agreement would, as a practical matter, impair or impede Basin's ability to protect its property interests in the Missouri Basin Power Project, particularly in Grayrocks Dam and Reservoir and the Laramie River Station. It is clear, therefore, that *parens patriae* considerations are inapposite here.

B. The History of *Nebraska v. Wyoming* Supports Basin's Intervention.

Nor is Wyoming's objection to this Court's permitting Basin to intervene supported by its invocation of *Nebraska v. Wyoming*, 295 U.S. 40 (1935).

That case chronicles the opening skirmish between Nebraska and Wyoming over the waters of the North Platte River. At the time, this Court had but recently granted Nebraska's motion for leave to file its complaint seeking an equitable apportionment of the North Platte's waters. *Nebraska v. Wyoming*, 293 U.S. 523 (1934). The 1935 decision was precipitated by Wyoming's motion to dismiss Nebraska's complaint. *See Nebraska v. Wyoming*, 295 U.S. 40 at 43 (1935). It is the disposition of that motion upon which Wyoming relies. One of the grounds of Wyoming's motion to dismiss was that the Secretary of the Interior was an indispensible party because of the Secretary's responsibility for the North Platte Federal reclamation project under the Reclamation Act of June 17, 1902, 32 Stat. 390, 43 U.S.C. § 383 *et seq. Id.*

It is, of course, true that this ground of Wyoming's motion was denied for the very reason Wyoming now cites in support of its opposition to Basin's intervention, to wit, that "Wyoming will stand in judgment [for the Secretary] as for any other appropriator in that state." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935) (*quoted* in Wyoming's Memorandum in Opposition to Basin's Motion for Leave to Intervene, at 2.) However, neither the United States nor the Secretary of the Interior were parties to this Court's proceedings on disposition of that Wyoming motion.[1]

The Court's decision was rendered April 1, 1935. Three years later, on March 31, 1938, and after the proceedings before this Court's Special Master had

[1] Nor did the Court make anything of the fact that Wyoming's grounds referred not to a claimed indispensibility of the United States but simply to a claimed indispensibility of the Secretary.

been underway for almost two years,[2] the United States moved to intervene. Among other grounds for intervention, the United States, "assuming that all [of its] rights to appropriate the waters of the North Platte River are derived from and are subject to the laws of Wyoming or the other litigant States,"[3] asserted as an independent ground for intervention that the rights of the United States were not being properly protected by either Nebraska or Wyoming. *See* Memorandum on Behalf of the United States to Intervene and Petition for Intervention (filed March 31, 1938) *Nebraska v. Wyoming*, No. 9 Original, October Term, 1937, at ¶ 10. As a further ground, the United States alleged that even if the United States were in exactly the same position legally as a private appropriator, the government's investment in the North Platte and Kendrick Projects (approximately $45,200,000 in irrigation and power facilities when completed) and the number of people (unspecified) dependent on the government's works warranted the presence of the United States as a party. *Id.*, ¶¶ 5, 6 and 12.

Notwithstanding opposition to the government's motion by all three states (*see* objections of Wyoming, filed April 21, 1938, and of Nebraska and Colorado, each filed April 22, 1938, *Nebraska v. Wyoming*, No. 9 Original, October Term, 1937) this Court promptly

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[2] The Special Master had been appointed in October, 1935. 296 U.S. 542. Hearings had begun in June, 1936. *See* Objections of Nebraska (filed April 22, 1938) to Intervention by the United States, *Nebraska v. Wyoming*, No. 9 Original, October Term, 1937.

[3] By this time Colorado had been impleaded as a defendant. *Nebraska v. Wyoming*, 325 U.S. 589, 596 (1945).

allowed the United States to intervene. *Nebraska v. Wyoming*, 304 U.S. 545 (1938). This Court's subsequent opinion and decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945) is testimony to the active role played by the United States in the proceedings subsequent to its intervention.

Basin's situation today starkly resembles that in which the United States found itself almost half a century ago. Basin's interests in the water supply for Grayrocks Dam and Reservoir and the associated Laramie River Station, upon which it and its associates have invested over $1,300,000,000 and which constitute principal elements in a power system serving over 1,200,000 people in eight states (*see* Basin Memorandum in Support of Its Motion for Leave to Intervene at 3), are not being adequately protected by either Wyoming or Nebraska. This Court should follow its 1938 precedent in this very case and allow Basin's intervention, Wyoming's opposition notwithstanding.

CONCLUSION

For the foregoing reasons and those set forth in Basin's Memorandum in Support of its Motion to Intervene, Wyoming's objection should be overruled.

Dated: April 24, 1987 Respectfully submitted,

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